West Virginia Steel Corporation, a wholly-owned subsidiary of Raleigh Mine & Industrial Supply, Inc. and United Steel Workers of America, AFL-CIO-CLC. Case 9-CA-36690

December 20, 2001

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND WALSH

On November 3, 1999,¹ Administrative Law Judge Benjamin Schlesinger issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,² and conclusions only to the extent consistent with this Decision, and to adopt the recommended Order as modified.³

The judge found that the Respondent violated Section 8(a)(1) of the Act by engaging in surveillance of Bobby Bonnett Jr., by informing employees that they would not receive a pay raise because of their concerted and protected activities, by implying that employees should resign if they continued to engage in union activities, and by interrogating employee Frank A. Honaker. The judge also found that the Respondent violated Section 8(a) (3) and (1) by permanently laying off Bonnett because he supported the Union. There were no exceptions to these findings.

The judge dismissed similar allegations that the Respondent acted unlawfully by permanently laying off employees Honaker and Dallas L. Spurlock. The General Counsel has excepted to the judge's dismissal of these allegations. With respect to Honaker, the judge found that even assuming that the Respondent had knowledge of Honaker's union activities, the General Counsel had failed to prove that the Respondent selected Honaker for layoff at least in part because of those activities. The judge found further that Honaker would have been laid off even in the absence of his protected con-

duct. With respect to Spurlock, the judge found that the General Counsel did not show that the Respondent knew about Spurlock's union activities at the time he was laid off, and therefore the judge concluded that the Respondent did not violate the Act. We agree with the judge's conclusion as to Honaker. ⁴ As explained below, we find that a remand to the judge for further findings regarding Spurlock is necessary for resolution of this issue.

In his decision, the judge found that Spurlock's inclusion in the complaint is based solely on his attendance at the March 14 union meeting, "for he does not appear to have engaged in any other union activities." The judge further found that "there is an utter void in demonstrating that Respondent had even an inkling that Spurlock was a Union supporter." Having thus found that the Respondent had no knowledge of his union activity, the judge dismissed the complaint allegation regarding Spurlock.

The General Counsel argues that the evidence establishes a prima facie case of discrimination against Spurlock and that the Respondent failed to show that it would have permanently laid off Spurlock in the absence of his union activity.⁵ In arguing that the Respondent had knowledge of Spurlock's union activity, the General Counsel relies on Spurlock's testimony. First, Spurlock testified that he had a conversation with Foreman David Farmer⁶ on March 12 in which Spurlock

asked him if he knew about the [March 14] Union meeting, and he said, no. I said, well, you know, I thought maybe you'd want to know. We'd discussed it, Frank Honaker and myself, and we thought it would be best that we would say something to him, give him a chance if he wanted to be part of it. David Farmer said that he didn't know anything about it. In the conversation he told me that [employee] Bill Smith had done told him about it, and that he had done told [day shift plant foreman] Larry Adkins about it. (Tr. 129.)

Second, Spurlock testified that he had a conversation with Foreman David Farmer on March 15. Spurlock testified:

[a]bout 1:45 we's walking up through the plant together, gathering up stuff for the Warehouse trailer, which is shipped to the Charleston Plant. I asked him

¹ All dates are in 1999, unless otherwise indicated.

² The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all of the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In the absence of exceptions, we find it unnecessary to pass on the judge's statements contained in fn. 14 of his decision concerning the status of employee Frank Honaker.

³ We shall modify the judge's recommended Order in accordance with our recent decision in *Ferguson Electric*, 335 NLRB 142 (2001).

⁴ Member Walsh adopts the judge's dismissal of the allegation that the Respondent violated Sec. 8(a) (3) and (1) by laying off Honaker based solely on the absence of evidence establishing that the Respondent was aware of Honaker's union activities.

⁵ See *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

⁶ The Respondent does not dispute that Foreman Farmer is a 2(11) supervisor. The judge, however, found that Farmer was a low-level supervisor who had no involvement in the layoff decision, and credited Farmer's testimony that he did not inform other supervisors or managers of Honaker's union activities.

how he felt about the Union and he said, anything to better yourself. (Tr. 131.)

Contrary to Spurlock's testimony that he spoke to Farmer on March 12, Farmer testified that before the March 14 union meeting took place, Honaker was the "first" and "only" person to mention anything in his presence about the meeting. (Tr. 502.) Farmer also testified that he could not recall any conversation with Spurlock on March 15. (Tr. 499.)

The judge did not specifically address the apparent conflict in the testimony of Spurlock and Farmer concerning a March 12 conversation in which the union meeting may have been discussed. The judge failed to make a credibility resolution as to whether the conversation took place. Additionally, assuming arguendo that the conversation did occur, the judge made no finding, as he did with respect to Honaker, that Farmer told no one in upper management that Spurlock invited him to a union meeting. Finally, the judge made no finding concerning a March 15 conversation between Spurlock and Farmer, which (especially if Spurlock is credited with respect to an earlier, March 12 conversation) may also tend to show the Respondent's knowledge of Spurlock's support for the Union.

We remand this proceeding to the judge to resolve these issues involving the Respondent's knowledge of Spurlock's union activities. In remanding, we direct the judge to analyze the evidence he previously overlooked and make findings thereon, matters uniquely within the province of the judge. If on remand the judge finds sufficient evidence of the Respondent's knowledge of Spurlock's union activities, then he should continue with an appropriate analysis of this case under the Board's Wright Line test and determine if the General Counsel and the Respondent have met their respective burdens.

Therefore, we shall remand this issue for the judge to make the appropriate analysis.

None of the other issues in this case are implicated by remanding the Spurlock allegation for further consideration and there is no reason to delay the resolution of those issues pending the outcome of the limited remand. Accordingly, we have decided it is appropriate to issue a final Order with respect to the 8(a) (1) independent violations, the 8(a) (3) and (1) Bonnett layoff violation, and the dismissed Honaker allegations.

ORDER

The National Labor Relations Board adopts the recommended order of the administrative law judge, as modified below, and orders that the Respondent, West Virginia Steel Corporation, a wholly owned subsidiary of Raleigh Mine and Industrial Supply, Inc., Charleston, West Virginia, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

- 1. Substitute the following language for paragraph 2(b).
- "(b) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable, place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order."
- 2. Substitute the following paragraphs for the last paragraph of the Order.

IT IS FURTHER ORDERED that the complaint allegations regarding Frank Honaker are dismissed.

IT IS FURTHER ORDERED that the issue of whether the Respondent violated Section 8(a) (3) and (1) of the Act by permanently laying off Dallas Spurlock is severed from the rest of the proceeding and remanded to the administrative law judge for appropriate action as noted above.

IT IS FURTHER ORDERED that the administrative law judge shall prepare a supplemental decision setting forth the credibility resolutions, findings of fact, conclusions of law, and a recommended Order, as appropriate on remand. Copies of the supplemental decision shall be served on the parties, after which the provisions of Section 102.46 of the Board's Rules and Regulations shall be applicable.

Counsel has made the required showing, the burden shifts to the Respondent to demonstrate that it would have taken the same action even in the absence of the protected union activity.

⁷ The judge credited Farmer's testimony to the extent that he never told anyone in management that Honaker invited him to a union meeting.

⁸ The Board may infer knowledge of an employee's protected activity from circumstantial evidence. That circumstantial evidence may include, inter alia (a) the timing of the adverse employment action, (b) the employer's general knowledge of union activities, (c) the employer's antiunion animus, and (d) disparate treatment. See, e.g., *Montgomery Ward & Co.*, 316 NLRB 1248, 1253 (1995), enfd. 97 F.3d 1448 (4th Cir. 1996) (mem.).

⁹ As the Board explained in *Regal Recycling, Inc.*, 329 NLRB 355, 356 (1999) (fn. omitted):

Under the test set out in *Wright Line*, in order to establish that the Respondent unlawfully discharged the . . . employees based on their union activity, the General Counsel must show by a preponderance of the evidence that the protected activity was a motivating factor in the Respondent's decision to discharge. Thus, the General Counsel must show that the employees engaged in union activity, that the Respondent had knowledge of that activity, and that the Respondent demonstrated antiunion animus. Once the General

3. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection To choose not to engage in any of these protected concerted activities.

WE WILL NOT engage in surveillance of our employees and monitor their activities.

WE WILL NOT inform our employees that a pay raise that had been approved would not be granted because of their concerted and protected activities.

WE WILL NOT interrogate our employees about their union support or union activities.

WE WILL NOT imply that our employees should resign if they continued to engage in union activities.

WE WILL NOT permanently lay off or otherwise discriminate against our employees for supporting the United Steel Workers of America, AFL-CIO-CLC, or any other union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act.

WE WILL within 14 days from the date of the Board's Order, offer Bobby Bonnett Jr. full reinstatement to his former job, or if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Bobby Bonnett Jr. whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, with interest.

WE WILL within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Bobby Bonnett Jr., and WE WILL within 3 days thereafter notify him in writing that this has been done and that the discharge will not be used against him in any way.

WEST VIRGINIA STEEL CORPORATION A WHOLLY-OWNED SUBSIDIARY OF RALEIGH MINE & INDUSTRIAL SUPPLY, INC.

James E. Homer, Esq., for the General Counsel.

Forrest D. Roles, Esq. (Heenan, Althen & Roles), of Charleston, West Virginia, for Respondent.

Waymon D. Free, Organizer, of Walton, West Virginia, for the Charging Party.

DECISION

FINDINGS OF FACT AND CONCLUSIONS OF LAW

BENJAMIN SCHLESINGER, Administrative Law Judge. On Monday, March 15, 1999, ¹ Respondent West Virginia Steel Corporation, a wholly-owned subsidiary of Raleigh Mine & Industrial Supply, Inc. (Respondent), permanently laid off three of its employees, Bobby Bonnett Jr., Frank A. Honaker, and Dallas L. Spurlock, 1 day after they had attended an initial meeting of employees with the Charging Party, United Steel Workers of America, AFL–CIO–CLC. The complaint² alleges that Respondent violated Section 8(a)(3) and (1) of the National Labor Relations Act (the Act), 1947, as amended, 29 U.S.C. Sec. 151 et seq., first, by selecting these three employees for layoff, and, second, by laying them off permanently and not recalling them.³ Respondent denies that it violated the Act in any manner.

Jurisdiction is conceded. Respondent, a corporation, has been engaged in the fabrication of steel products at its Charleston, West Virginia facility, where it fabricates plate for coal sumps, water tanks, and tube tresses and its Poca, West Virginia, facility (River plant), where it fabricates structural steel used to construct buildings. During the 12 months that preceded the issuance of the complaint, Respondent purchased and received at its two facilities goods valued in excess of \$50,000 directly from points outside West Virginia. I conclude that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. I also conclude that the Union is a labor organization within the meaning of Section 2(5) of the Act.

Bonnett instigated the Poca plant employees' organizing drive, contacting a representative of the Union in February by telephone, and meeting with him on February 24 or 25, when

¹ All dates refer to 1999 unless otherwise stated.

² The relevant docket entries are as follows: The Union filed its unfair labor practice charge on April 1 and amended it on May 5. The complaint issued on May 20. The hearing was held in Charleston, West Virginia, on July 22, 23, and 29.

³Despite much evidence at the hearing and substantial argument in his brief about the bona fides of Respondent's need for any layoff, the General Counsel contends in his brief:

The Administrative Law Judge is urged to note that Counsel for the General Counsel is not alleging as a violation of Section 8(a)(3) the Respondent's decision to have a general layoff. It very well may be that the new owners felt there was a valid basis for a layoff. But, in the instant case, Counsel for the General Counsel is contending that the Respondent's selection of the discriminatees for the permanent layoff to be violative of Section 8(a)(3).

they decided to call a meeting of the employees at a Hardee's restaurant on the third Sunday from then, March 14. In preparation for that meeting, Bonnett distributed a union pamphlet at the facility and elsewhere that the union representative had given him, captioned "YOU Need a Union NOW, More Than Ever"; and Bonnett spoke about the upcoming meeting not only with his fellow employees, but also with one supervisor. After Bonnett began distributing the pamphlet, Larry Adkins, Respondent's day shift plant foreman, began to watch Bonnett more closely, following him around the plant, to the maintenance room, and even to the restroom. On March 14, Bonnett and eight other employees, including Honaker and Spurlock, met with the union representative and explained their complaints about their workplace. The union representative told them what was needed to get the Union and how to get an election. The employees agreed to meet again the following Sunday or two Sundays from then, March 28.

Whether that second meeting was held was not revealed. What was important was that, the day after the first meeting, near the end of the shift, Bonnett, Honaker, and Spurlock were called into the office of Troy Stover, the Poca plant superintendent, who advised them that they had been permanently laid off because Respondent had to reduce its work force. Stover, who selected the employees for layoff, specifically told Honaker and Spurlock that he had no problem with their work. There was yet a fourth employee who was laid off, Allen Foster Jr., who had been hired a month before, on February 15. Because he did not attend the meeting, and thus, did not engage in any union or protected activities, at least as appears in this record, the complaint does not allege that Respondent violated the Act by laying him off.

The inclusion of Spurlock in the complaint is based solely on his attendance at the meeting, for he does not appear to have engaged in any other union activities. The only unusual fact about Spurlock is that his wife filed a complaint with the Occupational Safety and Health Administration (OSHA) about the Poca facility, which resulted in the finding of various violations, about which more later. For the present, the General Counsel's case was premised, in part, on Respondent's alleged notion that Bonnett, not Spurlock, was the cause of the OSHA inspection and that was one of the reasons that Respondent believed Bonnett must have been an activist, and thus, a union supporter. Other than the OSHA complaint, there is an utter void in demonstrating that Respondent had even an inkling that Spurlock was a union supporter. I conclude that, without such knowledge, the complaint regarding Spurlock has not been proved, and I will dismiss it. FPC Moldings, Inc. v. NLRB, 64 F.3d 935, 942 (4th Cir. 1995), enfg. 314 NLRB 1169 (1994).

Honaker and Bonnett present far different cases. Although all of Respondent's higher-ranking management and supervisors testified that they had no knowledge that the employees were engaged in any union activity until 1 or 2 weeks after the March 15 layoff, that testimony could not be truthful. One of Respondent's supervisors, paint rack foreman, David Farmer, and other employees testified that it was well known in the plant that the employees were talking about the fact that there was going to be a union meeting. Indeed, Honaker invited Farmer to attend that meeting and Bonnett invited cutting department fore-

man Matthew Neely III. (Both were low-level supervisors, and it was rumored that Farmer, for one, was paid hourly. Thus, the employees thought that they were actually employees, not supervisors.) It seems likely, therefore, that others in Respondent's chain of command either learned of the employees' union sentiments from a supervisor or from being in the plant.⁴

That would apply particularly to Adkins, who, while denying that he followed Bonnett around the plant when Bonnett began his organizing activities, defended himself by noting his regular practice of walking throughout the shop so that he would be available for anybody that needed help. I find it probable that Adkins learned of the employees' union activities during those walks. I also find it likely that he saw or overheard Bonnett as he distributed the union pamphlet or talked with other employees and thus started to watch Bonnett carefully. In so finding, I reject Respondent's contention that Bonnett, in making this claim, suffered from paranoia. He seemed to me a bright person, unlikely to concoct testimony about Adkins' actions after Bonnett began to distribute the pamphlet. In that respect, I conclude that Respondent violated Section 8(a)(1) of the Act by watching Bonnett and monitoring his actions in order to dissuade him from engaging in union activities. Capitol EMI Music, 311 NLRB 997, 1006 (1993), enfd. mem. 23 F.3d 399 (4th Cir. 1994).

In sum, I find that Respondent had ample knowledge that the employees were engaging in union activities, and, from Alkins' monitoring of Bonnett's activities, that Bonnett was a leader of the movement. That is not to say that Respondent knew what Honaker was doing, because I believe Farmer's testimony that he did not tell anyone that Honaker invited him to the meeting. That being so, there is nothing else in the record that proves that Respondent, other than a very low level supervisor, who had nothing to do with the layoff, knew that Honaker favored the Union or that he even attended the union meeting. Furthermore, except for inviting Farmer to the meeting, Honaker, like Spurlock, only attended the union meeting. He did not otherwise engage in any union activities or advocate bringing in the Union.

Respondent defended its selection of Honaker for layoff on two grounds. One was that it wanted to rid itself of employees who performed jobs that required little skills, in the hopes of maintaining and hiring employees who were more skilled and able to fill in at those positions for which little skills were required. Honaker was a sandblaster, a lower skilled job;⁶ and

⁴ According to Spurlock, Farmer, while first insisting that he did not know about the meeting, said that Bill Smith, the quality control employee, had told Farmer about it and that "he had done told Larry Adkins about it." It is unclear from this testimony whether it was Smith or Farmer who allegedly spoke with Adkins. I make no finding.

⁵ Farmer was totally surprised when he learned of Honaker's and the others' layoffs.

⁶ The most skilled job was in maintenance, requiring the employee to fix and maintain all the machinery, saws, and cranes. Next in skill were the fabricators or layout fitters, who are experienced in reading blueprints, tack welding, and cutting with torches, and quality control employees. Next were some machine operators, such as the one who operates a Cox set drill. The next are the cutting crew and the angle master or angle machine operators. The welders and saw operators

Respondent's witnesses testified that, while he had performed higher skilled jobs from time to time, he had done so inadequately, so that he was removed from those jobs and assigned to his present job which he had been doing for almost 8 years. There is nothing in the record that disproves Respondent's contention. Rather, it is supported by the fact that Honaker's position was never filled by an employee who was to perform sand-blasting exclusively. Rather, other employees with more skills filled in on this lesser skilled position as needed, and then returned to their more skilled jobs.

The second reason for selecting Honaker, Respondent contends, was that he had a "horrible" work record. That probably is exaggerated, but Honaker did have his problems with having accidents, although none too severe that he was placed on disability or that Respondent had to fill in for him, and problems of getting along well with others, resulting in his assignment to the sandblasting job, which left him isolated from the other employees. And Honaker did have a record of discipline, some somewhat ancient,⁷ and attendance and tardiness problems that resulted in warnings and a suspension for excessive tardiness for 3 days as recent as a month before he was laid off, February 10, when he was warned that if his conduct continued, he would be discharged. Thus, even had Respondent had knowledge that Honaker attended the union meeting and supported the Union and even had Respondent selected him for layoff for that reason, Respondent still showed other reasons for its selection of Honaker.

Furthermore, because the General Counsel has essentially conceded that Respondent was justified in laying off employees, a fact that I would have found in any event, there was no showing by the General Counsel of the person who should have been laid off, if Honaker had not. For example, there might have been the claim that Richard Miller, hired in November 1998, was the sandblaster on the second shift who had less seniority and Respondent should have selected that person, instead of Honaker. The General Counsel did not prove that Miller was less qualified at his job or that he did or did not attend the union meeting.8 Accordingly, I conclude that the General Counsel did not prove that Respondent selected Honaker because he engaged in union activities and, even if there were such proof, I conclude that Respondent laid off Honaker for reasons that did not violate the Act and that it would have taken the same action even in the absence of Honaker's protected conduct. Wright Line, 251 NLRB 1083

(both the 36 inch diameter and 52 inch bench saw) follow; and the least skilled are the painters, sandblasters, and warehouse employees, including helpers.

(1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983); *Naomi Knitting Plant*, 328 NLRB 1279 (1999); *Manno Electric*, 321 NLRB 278 (1996).

I reach the contrary conclusion regarding Bonnett, who had been employed continuously for 5 years and had previously been a layout fitter, a skilled job, on the night shift. Stover testified that Bonnett was removed from his position as a fitter because of low production, but there is nothing in Bonnett's file, as there was in the files of other employees who were not laid off, indicating that he was ever warned about low production. Nor is there any record that Bonnett was removed from his job. Rather, I find truthful Bonnett's testimony that he voluntarily transferred from that job because he wanted to work on the day shift and there was an opening on the day shift for someone to run the warehouse. Not only was he accomplished as a fitter. He performed and filled in on other skilled jobs, such as working the saws and operating the angle master, without adverse criticism. He, unlike almost 90 percent of the employees, could read blueprints, which was required for many of the skilled jobs.

Respondent's contention that Bonnett was a poor worker has no substance. Stover testified that Bonnett was disciplined much more frequently than the other employees. In Respondent's zeal to show how bad he was, Respondent added to his personnel record a warning given to Bonnett's father, who also works at the plant. Furthermore, Stover's testimony was not based on fact, as he acknowledged that Michael and Richard Bowles were each given two written warnings in 1998 and 1999 relating to their low production and inadequate work, yet Stover did not even look at their files. On that basis, Stover cannot claim the truth of his opinion of the disciplinary problems of Bonnett, as compared with the other employees, because he never compared them. In addition, Bonnett's personnel record does not appear to be that horrid. The most serious discipline resulted from Bonnett's failure to work overtime on a weekend in February, when he and three other employeesnone of them were laid off—were suspended for 3 days. Other than that, Bonnett was given warnings for not wearing his safety glasses on May 2, 1998; for excessive tardiness on June 17, 1996; and for tardiness on May 29, 1992.

Respondent's criticism of Bonnett's work was unsupported by any written discipline. Other employees were given written and verbal warnings. Adkins even thought enough of his own failures to issue a written warning to himself, yet Bonnett's file is empty. Respondent's witnesses also contradicted one another in an attempt to embellish on Bonnett's poor work habits. Stover said that he had no problem with Bonnett's accuracy in performing his job, yet Adkins complained of mistakes, also not documented. Finally, it appears that, on occasion, Bonnett had a dispute with his supervisor, Neely; but, once again, there is no documentary evidence that their relationship of about 10 months, even if difficult on occasion, represented a problem to the proper functioning of the Poca facility or anything more than the typical dispute that an employee might have with a supervisor. If Neely had had as much difficulty with Bonnett as he testified, surely Neely would have issued a warning of some

⁷ Honaker was warned on January 18 and December 14, 1990, for substandard work, and was warned on July 22, 1991, for taking far much time to grind material. He was given a warning for being late on July 6, 1992, and was warned 11 days later when he became angry and threw a caulking gun, almost hitting another employee. Honaker was suspended for 3 days without pay for substandard work on August 6, 1992, was issued a warning about tardiness and absenteeism on June 17, 1996, and was given a verbal warning for horseplay on July 2, 1997.

⁸ Robert Farrell, a painter on the second shift, hired on August 7, 1998, does sandblasting, too.

sort. Yet, Bonnett's personnel file was barren of any suggestion that Neely was having problems with his employee. Indeed, in early 1999, Neely told Bonnett that he had recommended a raise for both him and another employee; and Stover confirmed that fact, but said that he could not give any raises.

In sum, there is little to indicate the reason that Respondent selected Bonnett for a permanent layoff rather than someone else, particularly second shift warehouseman, Christopher Burdette, who was hired a month before, on February 15 (the same day as Foster, who was laid off solely because he was a new employee),9 and instead of the person who assisted Bonnett on his shift, Rick Harris, 10 who was hired in November 1998, took over Bonnett's duties (with Neely), and had little or no experience as a saw operator or a layout fitter operator or an angle master machine operator or a drill operator or a plate shearer, all the jobs that Bonnett had performed without warning or discipline. I conclude that Respondent selected Bonnett for layoff because of his known union activities and am not persuaded that he would have been selected before the less senior employees in any event, had he not engaged in union activities.

In so concluding, I do not rely on the General Counsel's contention that Respondent did not prove its need to lay off its employees permanently, the implication being that an employer has a right to lay off its employees only when it agrees to recall them, if they should be needed again. The General Counsel cites no Board decision that supports this contention; and I have found no authority that declares a layoff unlawful on the sole ground that it is permanent. The General Counsel belittles Respondent's claim that it wanted to secure a more skilled labor force, claiming that that is merely a euphemism for employees who are not union activists or supporters. Surely, however, Respondent has the right to seek employees who are able to perform skilled positions and who, when needed, are able to fill in at jobs that are less skilled. A reading of Respondent's June pay recommendations demonstrates that Respondent was ready to reward those employees who would move from job to job and who were equipped to work at skilled positions and fill in at less skilled positions when needed. Finally, Respondent has hired no one to fill Spurlock's or Honaker's positions. Its only new hires are skilled employees or temporary employees being trained for skilled positions. 11

There were several other unfair labor practices alleged in the complaint, the first of which related to the OSHA inspection that was held on February 23. When it was determined that OSHA was going to recommend fines against Respondent (OSHA issued a citation on March 2, with a potential fine of \$9420),¹² Adkins told some employees that he had some good news and some bad news: The good news was that they had been awarded pay raises; the bad news was that they were not going to get the raises because of the assessment of the fines by OSHA. At least that is the version of Adkins' narration by some of the witnesses. Consistent with their testimony is Stover's testimony that he told Adkins to tell the employees that "all pay raises would be frozen depending on the outcome of the OSHA inspection fines and/or penalties." Adkins and Production Superintendent David Cooper testified differently, to the effect that Adkins, pursuant to Cooper's instruction, went around the shop and told all the employees, even those who were not due raises, that the raises were being held up not only because Respondent did not know how the OSHA inspection would affect Respondent's financial condition but also because business was slow.

That makes a profound difference. In the first instance, employees are clearly being advised that if they complain to OSHA, that is, if they engage in protected activities, they are going to suffer for it. But, if the withholding of the raise was due to Respondent's poor financial condition because of the lack of work, then there is no violation. There were only two employees whose testimony arguably supported Adkins. Honaker recalled that the raise was going to be held up not only because of the OSHA fine but also because "they didn't know where they stood at in the profit sharing. On how the profit sharing was going to be." Honaker also recalled that Adkins mentioned Respondent's "financial situation." Jackie Chandler testified that Adkins also said, "We don't know if we have the money to give out raises." The testimony of both employees indicates that Adkins was clearly relating the OSHA fine to Respondent's financial ability to pay the increase. In neither's recollection did Adkins relate that the raises were being held up because of a lack of work. In light of Stover's admission, I discredit testimony to the contrary and credit those witnesses who testified that Adkins' mentioned only the OSHA fines. Accordingly, I discredit Adkins' testimony. In addition, Respondent failed to elicit any proof that the fine reduced its assets to such an extent that it was foreclosed from raising the wages of the eight or nine employees to whom it planned to give such increases. Accordingly, I conclude that Respondent violated Section 8(a)(1) of the Act.

Another alleged unfair labor practice relates to my finding that Respondent had knowledge of the employees' union activities. According to most of the witnesses, including several called by Respondent, S. Richard Smith, Respondent's president, spoke to the day-shift employees within a week of the lay offs, exhorting everyone to be a team player and "if you didn't want to be on the team, you didn't need to be there." Most of the witnesses could recall little else of what Smith said.

⁹ Stover testified that he did not lay off Burdette, despite his lack of skills, especially when compared to Bonnett, because Burdette was a "fast learner" and Stover liked his "attitude." I do not believe him. To the extent that he may have liked Burdette's attitude, he disliked Bonnett's because of his union advocacy. By June 10, Burdette was still working in the warehouse and was not employed in a skilled job.

working in the warehouse and was not employed in a skilled job.

10 Stover testified that Harris, too, "catch[es] on pretty quick" and that he had the potential to move into fabrication because of "[h]is attitude, self-confidence in himself." When Stover laid off Bonnett, he asked what was going to happen to Harris. Stover replied that he would probably get Harris next. There is no credible evidence of a reason that Stover did not lay off Harris first, except for Respondent's illegal motivation.

¹¹ Each year, Respondent has hired temporary employees during the summer months and laid them off afterwards.

¹² On March 19, Respondent informally resolved the violations, agreeing to pay fines of \$5400.

Smith, however, did, in testimony that was unfortunately punctuated by leading questions, he told the employees that he was very sorry to have the layoff a week before, but it was necessary for the company to continue. Business had not come in the way management thought, despite the fact that it was doing everything in its power to obtain work, even work that it was taking at cost, with no profit, just to keep the employees working. "You can rest assured that we're doing everything in our power to get work in here and it don't even have to be at a profit. If we can get it in here at cost to keep us working, "we're doing that." As to the present, Smith said that the books were not yet closed and management could not figure out what the profit sharing was going to be. As to the future, "surely things were going to get better."

Smith testified that he told the employees that they were the company's most important asset and that he would invest in them as much as possible. He added that his philosophy was that of a team. If he had a problem with the employees, he would address it and, together, they would talk about it and resolve it. On the other hand, if the employees had a problem with management, they should come and talk to management, who would listen and meet the employees halfway. If the employees did not feel that they were getting the right answer from the supervisors or feel that they were being treated unfairly, they should take the problem to the next level; and if that did not work, the door to Smith's office was always open. Above all else, he wanted the employees to be as happy as management could make them, so that the company could take care of its customers and take care of its future. When Respondent's counsel asked Smith whether he said anything about employees who did not want to be members of the team, he avoided answering, stating: "I told them that they should be able to discuss their problems, I have opened every door, we want you to come and talk, let's get them resolved and let's move on." I find that he made the remarks attributed to him by almost all of the witnesses.¹³

Smith explained that he met with the employees to cheer them up by looking forward together to the future. As he testified:

The purpose was to try to get everybody to understand that things weren't so bad, to get the spirits up a little bit, because we didn't have no work, we'd just had a layoff, we had a couple of other things going on, one of them was profit sharing, that had not been done at that point.

But that could not have been the sole purpose. First, Smith spoke only to the Poca employees. He did not speak to the employees at the Charleston facility, which suffered from the same poor financial conditions as did the Poca facility. Second, there was nothing about the suggestion of quitting that would pick up the employees' spirits. Nor was there any incident that would have caused Smith to make the suggestion or that indicated anyone's failure to be on the "team," except for two recent facts: the holding of the union meeting and the complaint to

OSHA that Respondent (clearly Neely) may have attributed to Bonnett. Smith's remarks were aimed at one of those activities, more probably the union activities, indicating that union activities were incompatible with continued employment. I conclude that Respondent violated Section 8(a)(1) of the Act. *Paper Mart*, 319 NLRB 9 (1995).

Finally, the complaint alleges that after Honaker was laid off, he came back and reported that fact to Farmer, who immediately interrogated him about who was at the meeting, specifically asking for the names of the employees on the second shift and asking whether one employee in particular, Dickie Jett, had attended. Farmer said that Adkins had, for a long time, been wanting to get something on Jett so that Respondent could get rid of him. Farmer denied this interrogation, but I find no reason that Honaker would make this up. Indeed, I found Farmer to be thoroughly outside the loop and unaware of what management was doing or thinking. Thus, his lack of understanding that Respondent was never restricted from discharging Jett, who had engaged in one act in the past that all agreed was irresponsible and extraordinarily dangerous. Nor did Farmer understand that Jett seemed to have reformed, and Respondent considered him more valuable. Indeed, Jett was recommended for a wage increase in June as a hard working, fully cooperative employee. In sum, Honaker's testimony is credible, and I find that Respondent engaged in illegal and coercive interrogation in violation of Section 8(a)(1) of the Act.14

The unfair labor practices that I have found constitutive unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that Respondent discriminatorily laid off Bonnett, I will order it to offer him reinstatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from date of his layoff to the date of Respondent's proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹⁵

ORDER

The Respondent West Virginia Steel Corporation, a whollyowned subsidiary of Raleigh Mine & Industrial Supply, Inc., its officers, agents, successors, and assigns, shall

¹³ Even his son corroborated their testimony. The best testimony that Respondent could elicit was that of two employees who denied that Smith said anything to the effect that employees should resign because of their union activity.

¹⁴ Technically, Honaker may not have been an employee, because he was laid off minutes before. There is nothing to demonstrate, however, that he was not paid for the whole day, so he was still on the payroll.

¹⁵ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

- 1. Cease and desist from
- (a) Engaging in surveillance of its employees and monitoring their activities.
- (b) Informing its employees that a pay raise that had been approved would not be granted because of their concerted and protected activities.
- (c) Coercively interrogating its employees about their union support or union activities.
- (d) Implying that its employees should resign if they continued to engage in union activities.
- (e) Permanently laying off or otherwise discriminating against its employees for supporting the United Steel Workers of America, AFL-CIO-CLC, or any other union.
- (f) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act.
- 2. Take the following affirmative action necessary to effectuate the policies of the Act.
- (a) Within 14 days from the date of this Order, offer Bobby Bonnett Jr. full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.
- (b) Make Bobby Bonnett Jr. whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of this decision.
- (c) Within 14 days from the data of this Order, remove from its files any reference to the unlawful discharge, and within 3 days thereafter notify the employee in writing that this has been done and that the discharge will not be used against him in any way.
- (d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all pay-

- roll records, social security payment records, timecards, personnel records and reports, and all other records including an electronic copy of the records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.
- (e) Within 14 days after service by the Region, post at its facility in Poca, West Virginia, copies of the attached notice marked "Appendix." 16 Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered' by any other material. In the event that, during the pendency of these proceedings, Respondent has gone out of business or closed the facility involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Respondent at any time since February 23, 1999.
- (f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

¹⁶ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."